

LAW AND CONTEMPORARY PROBLEMS

VOLUME 30

SUMMER, 1965

NUMBER 3

FOREWORD

The individual business firm has come more and more to experience the constraints of antitrust in the daily conduct of its business. This has occurred as the law has been broadened to cover the conduct of firms other than the largest and more than just extraordinary business practices. The increasing impingement of antitrust on the single firm has called forth much critical comment, the most provocative of which is that purporting to be grounded in fundamental economics. The critics' general argument along this line has been that control of business conduct is itself anticompetitive because many of the practices outlawed are "competitive tactics equally available to all firms."¹ Other practices are held not to give rise to monopoly power but only to be symptomatic of its existence, and prohibition of particular practices in these circumstances, it is said, serves no purpose other than to reduce monopoly's profitability, the feature of monopoly that, as an economic matter, should concern us least.² While plausible, these emerging criticisms are highly debatable both on economic grounds and as a basis for the formulation of law.³

It is not necessary to agree wholly with the foregoing criticisms of the conduct-controlling aspects of antitrust to wonder whether new inhibitions on firms' competitive freedom may not weaken competitive vigor in the market place as surely as the anticompetitive conduct of any competitor. Because antitrust law does appear in significant ways to be at odds with itself, the editors of *Law and Contemporary Problems* have assembled this symposium on "The Antitrust Laws and Single-Firm Conduct."

Fundamental economic criticism of the law governing the competitive practices of the single firm is commonly identified with a group of economists and economics-oriented lawyers previously or presently associated with the University of Chicago.⁴ The views of this group are characterized by a classical emphasis on competition as

¹ Bork & Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 366 (1965).

² *Id.* at 366-69; Bowman, *Contrasts in Antitrust Theory: II*, 65 COLUM. L. REV. 416, 418-21 (1965).

³ Both sides of the broad issues are debated in Bork & Bowman *versus* Blake & Jones, *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363 (1965).

⁴ Their widely acknowledged mentor is Professor Aaron Director, recently retired professor of economics at the University's law school. For the classic statement of the views that have influenced this group, see Director & Levi, *Law and the Future: Trade Regulation*, 51 NW. U.L. REV. 281 (1956).

the guarantor of maximum resource use and consumer satisfaction. The theoretical grounding of their argument explains in part why six of the eight contributors to this symposium are economists. The reader will not fail to note the divergence in the points of view represented.

Control of the single firm is one of two main themes of antitrust, the other being, of course, the paramountcy of competition. While the Chicago school of thought finds little harmony in the concurrence of these themes, the history of their emergence appears to reveal no basis for choosing one above the other as we are asked to do. A brief review of this history may be instructive.

The well-established rules prohibiting competing firms from eliminating competition *inter se* have not occasioned appreciable dissent. These rules were preferred in the early cases over the alternative of a rule permitting private regulation of "ruinous" competition so long as consumers were not charged "unreasonable" prices. Lending support to this outcome was a strong distrust of accumulated market power, coupled with concern for the interests of consumers, which courts felt inadequate to protect through supervision of cartels. Because competition promised to prevent the cartelization of whole industries and to extend to consumers the guarantees of self-regulating markets, it was easily exalted as the chief tenet of a statute that failed to mention it.

There was also, of course, the parallel development of the theme of predatory practices, of abuses of accumulated market power. Again it was a fear of market power and how it might succeed in aggrandizing itself that influenced the law's direction. This fear was reflected in the enactment of section 2 of the Sherman Act, in the emphasis on predatory conduct in the early cases applying section 1, in the enactment of the Clayton and Federal Trade Commission acts, and ultimately in the passage of the Robinson-Patman Act. Through these developments the conduct of the single firm, as distinguished from collaborative multi-firm activities, became subject to statutory constraints even when monopoly itself did not exist and was not even necessarily threatened.

The absolute faith in competition seemingly demonstrated in the price-fixing and market-division cases can probably be understood only in relation to the limitations simultaneously imposed on the conduct of the single firm. The principle of competition was easier to endorse because controls on the competitive methods of powerful firms existed to prevent the abuses that might be apprehended and the emergence of monopoly. Viewed in this light, the early dedication to the strict competitive principle and the free market ideal was not particularly deep. The competitive contest was to be carried on fairly according to statutory and regulatory rules and was not in any strict sense synonymous with *laissez faire* or the classical free market economy. Given the structural defects of the economy existing at the time the antitrust laws were enacted and first applied, no complete embracement of the idea of unrestricted competition could have been possible. Single-firm market

power, already attained by emerging dominant firms in many industries before effective enforcement of the Sherman Act or passage of the Clayton Act could prevent it, had to be controlled if it could not be eliminated, and the law offered little likelihood of its elimination.

Control of the single firm is thus rooted in the origins of antitrust, and today's efforts in the direction of regulating single-firm activities are more or less consistent with those origins. This is not to say, however, that the two themes of antitrust—exaltation of competition as a regulator of markets on the one hand and close supervision of competitive practices on the other—are philosophically or economically consistent. The antinomy apparent in the simultaneous efforts to promote and to circumscribe competitive endeavor has existed in some degree since the antitrust effort got under way. However, increases in the number of cases brought and in the willingness of judges to find anticompetitive effects flowing from particular kinds of conduct have recently made observers more aware of the law's two-mindedness.

The ultimate problem out of which the apparent inconsistencies of antitrust arise is, of course, the long-standing failure of the law to deal effectively with market structure. The reasons for this failure are far-reaching and complex, and possibly sufficient as a matter of objective policy, but the fact remains that antitrust has not kept the size of firms within limits that clearly permit full reliance on competition as the guarantor of maximum welfare. While the impact of relatively and absolutely large firm size on the competitive process is in large part unsettled, even conservative economists agree that, below some point, the smaller the number of firms in an industry the less competitive the industry is likely to be. Yet no legal basis for attacking oligopoly directly has been devised. Instead, antitrust has been used to regulate the conduct of dominant firms as a means of precluding further market concentration through the capture by such firms of smaller competitors' market shares and of holding open the door for deconcentration through new entry. Regulation of conduct is thus demonstrably a substitute for a policy wholly oriented to competition and the maintenance of markets that are truly free.

The importance attached to controls on market structure, and to firm size *per se*, has been reflected in the recent upsurge in antimerger activity. While mergers obviously involve more than one firm and might therefore be deemed outside the scope of this symposium, several of the contributors have observed the substantial emphasis placed in recent merger decisions on the creation of a potentiality for anticompetitive conduct. This new ground for a finding of illegality has introduced a conduct-oriented analysis in an area where structural considerations previously prevailed. One example of this new emphasis on conduct is the now widespread use of foreclosure concepts in vertical merger cases. Another example, discussed in two of the articles herein, is the manner in which the practice of reciprocity, or the potential therefor, has been given decisive weight in recent cases involving conglomerate mergers. The

desirability of judging mergers on these grounds is a major issue in the on-going debate over the direction of antitrust generally.

Remedial measures under the antitrust laws present an important collateral aspect of antitrust's impingement on the single firm, one that is not treated in this symposium but is perhaps deserving of a separate one. The issues raised by antitrust remedies include the following: (1) What is the extent of the *ad hoc* regulation of United States industry accomplished by means of antitrust decrees consented to or litigated? (2) What are the implications of this haphazard regulatory pattern, particularly in view of its relative immunity from administrative law standards and from normal legislative and judicial supervision? (3) Are antitrust decrees useful mainly in handicapping the large firm for the benefit of small competitors or do they achieve beneficial economic objectives?⁶ These thoughts serve to illustrate the breadth of the problems and to suggest that actual conditions may discredit the common claim that antitrust provides a viable alternative to bureaucratic control of the economy.

The symposium that follows is for the most part dedicated to economic and legal analysis of particular areas where conduct is governed by the antitrust statutes. In addition to the fundamental questions raised by the Chicago critics about the wisdom of giving the Clayton and Robinson-Patman acts significant scope, the articles deal with the perennial question about the standard of injury to competition that should be applied under these statutes and the means of measuring anti-competitive effects. The article on individual refusals to deal confronts the crucial area where the Sherman Act's effect on activities of the single firm is least settled, and points up the anomaly that, while the act's application to vertical arrangements often allows it to reach conduct initiated by a single dominant supplier, the more blatantly coercive a supplier's conduct is, the less likely it is that the act will apply.

The symposium as a whole is only an early chapter in a developing dialogue. The editors believe that antitrust continues to pose issues beyond the particular application of particular statutes to particular facts and hope that the high plane on which the discussion is carried on here will be an example to others taking part in the continuing debate.

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⁶ An intriguing and widely discussed experiment in the efficacy of using controls on conduct as a means of eroding a single-firm monopoly is currently being evaluated in a district court in Massachusetts. Judge Wyzanski has lately reopened the monopolization proceedings against United Shoe Machinery Corporation to determine whether the 1953 decree, which sought by regulating United's marketing and patent licensing practices to cause its monopoly to break down, has had the intended effect. See *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).